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SUPREME COURT NO.: 97-5310

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When a creditor violates the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, can the consumer raise his statutorily created right to rescind as a defense to the creditor's foreclosure suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort, or can the creditor escape the consequences of a §1635 rescission when he sues to foreclose the mortgage after §1635(f)'s 3 year limit expires on the theory that the right to rescind is a statutorily created right that expires after 3 years as held by Florida's Supreme Court?

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PREFACE-ABBREVIATIONS USED

Petitioners will use the following abbreviations in the brief;

TIL ..... 15 U.S.C. 1601, et.seq., Federal Truth In Lending Act

§1601 ..... Specific section of 15 U.S.C. 1601, et.seq.,

TIL ..... Pre-1980 15 U.S.C. 1601, et seq.

new TIL ..... TILA after the Simplification and Reform Act of 1980

FRB ..... The Federal Reserve Board

Reg Z ..... 12 C.F.R. 226.01,

O.S.C ..... Official Staff Commentary to Reg. Z issued by the FRB

APR ..... Annual Percentage Rate of Interest under 15 U.S.C. 1606 & 1638(a)(4)

FC ..... Finance Charge under 15 U.S.C.1605 & 1638(a)(3)

AF ..... Amount Financed under 15 U.S.C.1638(a)(2)(A)

IAF ..... Itemization of Amount Financed under 15 U.S.C.1638 (a)(2)(B)

Petitioner will refer to DAVID R. BEACH and LINDA M. BEACH, his wife, Petitioners, as "the Beaches" and GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS, as "GW".

STATEMENT OF FACTS AND CASE

Great Western seeks to minimize all the errors found by the trial court and affirmed through the Florida Supreme Court's opinion: GW overstated the monthly payment by $00.58 a §1638(a)(6) violation, and the corresponding total of payments by $201.84 a §1638(a)(5) violation. The payment error resulted in a misstated finance charge, amount financed, and annual percentage rate, which violates §1638(a)(3),(4)&(5). The trial court then found GW wrongly disclosed the finance charge, the amount financed and corresponding annual percentage rate by Florida's intangible tax. The trial court also found GW erred by the use of estimated disclosures [See trial opinion, App. to Initial Brief 1, p. 8-11, 12, 14]. These findings were affirmed through the Florida Supreme Court.

REPLY ARGUMENTS SUPPORTING REASONS FOR GRANTING THE WRIT

GW agrees all other state courts conflict with Beach v. Great Western Bank 22 Fla.L.WK.S71 (Fla.1997) interpretation of §1635(f). GW argues Congress intended states to control whether rescission is available as a defense by recoupment for a federal right evidenced by a 1995 TIL amendment. GW then reasons the Court should not grant certiorari to create harmony because Congress intended disharmony. The argument may have superficial appeal but lacks support in reason after close examination.

GW p.5 cites §1640(e)[1980] which allows recoupment "except as otherwise provided by state law" and claims this is a state "opt out" clause. The Beaches disagree §1640(e) allows states to opt out of §1640(e) recoupment. However, if it is an opt out clause Beach's rules of statutory construction, which mirror this Court's rules, prohibit and reject GW's argument.

GW reasons Congress used the phrase "except as otherwise provided by state law" to evidence its intent to allow states to decide to allow damages after §1640(e)'s one year limit. GW then cites a different phrase in §1635(i)(3) to argue Congress had the same intent. Beach's p.73 rules of statutory construction, reject GW's "opt out" same intent by a different clause argument:

> "[w]here Congress includes particular language in one section of a statute but omits it in another section of a statute, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusions or exclusions." Id. p.73
>
> "[w]hen the legislature has used a term ... in one section of a statute but omits it in another section of the same statute, we will not imply it where it has been excluded." Id., p.73

GW argues Congress included the particular §1640(e) language

"except as otherwise provided by state law" to evidence its intent to allow individual states to opt out of post limit recoupment. Congress omitted the "except as otherwise provided" language from §1635(i)(3)'s phrase "recoupment under state law". Beach and this Court holds it is generally presumed Congress acted intentionally and purposely in the disparate inclusion of "except as otherwise provided" in §1640(e)[1980] and its exclusion from §1635(i)(3)[1995]. Beach and this Court bar a Court from implying Congress intended §1635(i)(3)[1995]'s "recoupment under state law" phrase really meant "except as otherwise provided by state law" where Congress specifically excluded the §1640(e)[1980] phrase from §1635(i)(3)[1995]. Beach and this Court reject GW's argument that §1635(i)(3)[1995] is a state "opt out" phrase like §1640(e)[1980].

Beach fn 6 refused to address the 1995 TIL amendments because they did not apply to the facts. GW tries to overcome this flaw in its argument by citing §1635(i)(1-2)'s phrase "subject to the time period provided in [§1635(f)]" to argue Congress intended to allow each state "opt out" rights. GW does not explain how this phrase evidences Congress' intent to allow states to opt out. GW cannot explain this because the §1635(i)(1-2) phrase shows Congress never intended §1635(f) to act as a statute of repose to bar affirmative defenses by recoupment for any state.

Congress passed the 1995 TIL amendments largely to protect the lending industry from potential billion dollar liability for Rodash v. AIB Mortgage Corp., 16 F.3d 1142 (11th Cir. 1994) rescission class actions [see Remarks by Rep. Roukema, Cong.Rec.H. 9514, Sept.

27, 1995, Smith v. Highland Bank, 108 F.3d 1325 (11th Cir. 1997), affirming Smith v. Highland Bank 915 F.Supp.281, p.293,294, fn.7,8 (D.Ala. 1996) and end confusion in re Porter 961 F.2d 1064 (3rd Cir. 1992) created over the rescission form by forcing lenders to use FRB approved forms. In order to get retroactive immunity for Porter and Rodash suits at §1605(f)[1995] and §1649[1995] lenders had to accept Congress' grant to consumers of §1635(i)'s limited right to rescind defensively as a compromise to: 1) protect lenders from billion dollar class rescission suits; 2) protect individual consumers in default by letting them rescind for the same errors barred as class claims; 3) allow some defensive rescission after §1635(f)'s 3 year limit expired for the individual consumer; & 4) compel use of standard FRB rescission forms. see proposed and rejected March, 1995 Bill [§7 "Limitation of Liability" absolutely ended rescissio after 3 years], Remarks of Rep. Leach, Cong. Rec. H. 9514 Sept. 27, 1995, Remarks of Rep. Gonzalez, Cong. Rec. H. 9515 Sept.27, 1995, Remarks of Sen. Sarbanes, Remarks of Sen. D'Amato Cong. Rec. S. 14567 Sept. 28, 1995.

§1635(i) does not create opt out rights but affirms Congress' intent to allow post limit rescission by creating a defense not an action. Under Beach's adoption of the Federal statute of repose definition, §1635(f)&(i) must create a new liability and give an action to enforce the right unknown at common law, and fix the time within which the action may be commenced as an indispensable condition of the liability and the action which it permits. §1635(i) did not create a new TIL rescission liability and an action to enforce

it. §1635 (i)(1-2)[1995] created new rescission rules and did not give the consumers an action to enforce the rules. §1635(i)(1-2) only gave consumers a defense after a creditor initiates a judicial or non-judicial foreclosure, and for limited circumstances.

A defense is not an action. They are two diametrically opposed legal concepts. see **Black's Law Dictionary**, 6th Ed.: p.28 Action as opposed to p.419 Defense. Since §1635(i)(1-2)[1995] only creates a defense, §1635(f) cannot fix the time to bring "an action" under §1635(i). §1635(f)'s 3 years adopted at §1635(i)(1-2)[1995] cannot be an indispensable condition of liability or the action when §1635 (i)(1-2) only created a defense after a consumer is in foreclosure, thereby making §1635(i) outside the Beach and Federal statute of repose definition.

Federal Law rejects GW's argument because under Federal Law, a claim for rescission is not an action but an affirmative defense. Resolution Trust Corp. v. Love, 36 F.3d 972,976 (10th Cir.1994), National Union Fire Ins. Co. v. City Sav., 28 F.3d 376,393-394 (3rd Cir.1994). Resolution Trust Corp. v. Midwest Federal Sav., 4 F.3d 1490,1495-1497 (9th Cir.1993), Resolution Trust Corp. v. Schonacher 844 F.Supp 689 (D.Kan.1994). National Union p.394, fn 26. broadly interpreted "claim" and found rescission an affirmative defense not a claim under federal law and outside of FIRREA's claim preclusion provision. No logical reason exists to distinguish between TIL and other federal rescission rights since TIL rescission adopted and only re-ordered common law rescission. Williams v. Homestake Mortg. Co., 968 F.2d 1137,1140 (11th Cir.1992).

Distribution Services Ltd. v. Eddie Parker Interests Inc., 897 F.2d 811,813-814 (5th Cir.1990) specifically rejects the statute of repose/statute of limitation dichotomy for statutory rights when raised as an affirmative defense for Federal Law. GW's argument not only lacks support under logical analysis, but conflicts with Eddie Parker, 813-814, National Union p.394, fn 26, Midwest, Love, and Schonacher. Federal Law recognizes rescission is only a defense, so Congress always intended §1635 rescission rights to be available as a defense after 3 years expires. Congress made its intent clear in §1635(i)[1995] because Congress did not make the new defense an action and outside of Beach's definition of a statute of repose.

Beach, adopted this Court's rules of statutory construction This Court prohibits reading "action" into §1635(i)[1995] because Congress specifically used "action" to describe damage suits throughout §1640 but declined to use "action" to describe the right to rescind in §1635(f) and §1635(i) before and after the 1995 amendments. It is generally presumed Congress acted intentionally and purposely in the disparate inclusion of "action" throughout §1640 and exclusion of "action" from §1635(f)&(i). Beach and this Court prohibit a Court from implying Congress intended §1635(f)&(i) rescission as an "action" where Congress excluded "action" from §1635(f)&(i). Beach and this Court reject interpreting §1635 as an "action" as argued by GW. Congress had to intend §1635(f)&(i) as an affirmative defense before and after 1995.

Love p.976 and National Union p. 393-394 clearly distinguish between an "action" barred by repose and rescission affirmative

defenses not barred by "repose" for recoupment. "Action", the linchpin for Beach's rationale, depended heavily on Devlin v. Aetna Finance Co., 379 So.2d 972 (Fla.5 DCA 1979), cert.den.389 So.2d 1108 (Fla.1980). However, §1635 and specifically §1635(i)[1995] did not create an "action". Since §1635(f) and §1635(i)[1995] did not create an "action" Congress must have intended to allow rescission as an affirmative defense and so available in recoupment for all states. §1635(i)[1995] does not support GW's argument that Congress allowed each state to deal with rescission after 3 years.

GW argues Beach agrees with Reiter v. Cooper, 113 S.Ct 1213, 1218 507 U.S. 258, 122 L.Ed2 604(1993), Bull v. United States, 295 U.S. 247,262 55 S.Ct. 695,700 79 L.Ed. 1421(1935) and United States v. Western Pacific R. Co., 352 U.S.59,71 77 S.Ct.161,169, 1 L.Ed.2d 126 (1956) because Beach pays homage to the FRB's interpretation of §1635(f) as statute of repose in Reg Z 226.23(a) under this Court's rules of statutory construction. GW overlooks the fact that §1640 used "action" while §1635 declined to use action. Beach generally presumed Congress acted intentionally and purposely by including "action" in §1640 and excluding "action" from §1635. GW agrees this Court prohibits implying Congress intended §1635 rescission as an "action" where Congress excluded "action" from §1635. GW must agree that Beach conflicts with Russello v. United States, 464 U.S. 16, 23, 104 S.Ct.296,300 78 L.Ed.2d 17 (1983) because Beach wrongly equates a §1640 "action" with a §1635(f) rescission defense.

GW then tries to distinguish Reiter, Bull and Western Pacific, by arguing §1635(f)'s "statute of repose" is different from Reiter,

Bull and Western Pacific's statutes of repose. Notably absent from GW's argument is a case that describes any Federal statutory action allowed as a defense after the repose expires in the cases cited by Beach's initial brief as anything but a classic "statute of repose" under Federal Law. GW really argues that Reiter, Bull and Western Pacific deal with a statute of repose not barred defensively, while §1635(f) is a different statute of repose which is forever barred. The argument has several flaws.

James v. Home Construction of Mobile, 621 F.2d 727 (5th Cir. 1980) already considered and rejected the argument so GW's argument conflicts with James. Although GW agrees James conflicts with the Beach §1635(f) statute of repose reasoning, GW tries to distinguish James by arguing James and Beach only tried to determine Congress' intent. GW overlooks the fact that they both attempted to interpret intent for the same §1635(f) and arrived at diametrically opposite results. Thus GW agrees conflict exists between Beach's and James' interpretation of Congressional intent as to §1635(f) for which this Court has an express grant of jurisdiction.

GW then cites 2 post-James cases to argue the 11th Circuit recently affirmed the statute of repose concept, thus implying the 11th has receded from James. However, much like the Eddie Parker, p. 813-814 argument, GW's 2 cases only deal with the right to bring a suit. As anticipated in the Beach initial brief, GW cannot cite 1 federal case that holds a defendant cannot raise a repose barred federal statutory action as a defense to the Plaintiff's claim. GW really asks this Court to establish one form of statutes of repose

for §1635(f) suits and a different set for the remaining Federal statutes of repose, which James already rejected.

GW did not refute the Beaches legislative history of §1640 compared to §1635 except to say it was not relevant to certiorari. The fact Congress added a regulatory enforcement extension does not show Congress intended to address a non-existent post 3 year limit problem in 1980 by not adding a §1640(e) recoupment phrase. GW then cites the December 1972 Report of the Nat. Commission on Consumer Finance to argue Congress intended to limit all rescission rights to 3 years. If it intended otherwise, it could have said so.

The Beaches properly argued Congress, the National Commission on Consumer Finance and the 1972 Annual Report to Congress on TILA by the Board of Governors of the Federal Reserve System were only concerned with title clouds after a sale of property and not an absolute limit of 3 years. The National Commission and 1972 Annual Report arrived at 3 years only to uniformly terminate the right to clear up title problems because different states may have different rules regarding when title passes. For example a contract for deed in some states may not meet TIL's definition for a "sale" and so cloud titles in some states for many years until title actually passes. Congress added 3 years to end the right only to clear title for uniformity and GW can cite no other purpose for the 3 years.

GW cannot refute the argument that Congress did not originally concern itself with the effects of rescission after 359 payments of a 30 year mortgage. GW cannot cite one case, other than Beach to argue Congress intended rescission as a penalty. All other cases,

as cited in Beach's initial brief, hold the right to rescind is an equitable right designed to allow consumers 3 days to think whether to encumber and risk their home to foreclosure based on the terms disclosed with the remedy designed to cancel a loan based on wrong disclosures and restore the parties to the pre-closing status quo. Williams, p.1140-1142 (11th Cir.1992), Porter, p.1074, Rodash, p. 1145, Federal Deposit Ins. Corp. v. Hughes, 684 F.Supp 616,622-623 (D.Minn.1988), aff'd Federal Deposit Ins. Corp. v. Hughes 938 F.2d 889 (8th Cir.1991).

GW bolsters its argument by claiming the Court held it liable for a small $7.24 error which should exonerate GW from liability. GW ignores the fact that the trial court found GW wrongly disclosed the finance charge, the amount financed and corresponding annual percentage rate by Florida's intangible tax, the payment schedule by $.58, corresponding total of payments, and the use of estimated disclosures' [See trial opinion, App. to Initial Brief 1, p. 8-11, 12, 14], all affirmed on appeal. see Beach v. Great Western Bank 670 So.2d 986,993, fn 4 (Fla.4 DCA 1997), aff'd at Beach, p.71.

Notwithstanding the fact that the trial court found a myriad of TIL errors, GW seeks to minimize the errors to argue it is the sympathetic party wronged by a clever consumer who strategically defaulted. GW essentially argues this Court should interpret TIL broadly in favor of creditors to protect them from unsympathetic sophisticated consumers. Every case rejects GW's arguments. Semar v. Platte Valley Fed. Sav.& Loan, 791 F.2d 699,704 (9th Cir.1986), Shroder v. Suburban Coastal Corp., 729 F.2d 1371 (11th Cir. 1984)

[TIL liability in favor of paralegal].

CONCLUSION

The Beaches respectfully submit Certiorari should be granted to resolve the express and direct conflict between the Florida Supreme Court's decision that pays homage to the statutory created right and statute of repose doctrine for recoupment. When creditors violate the Federal Truth in Lending Act leading to a consumer's 15 U.S.C. §1635 extended right to rescind, this Court should treat the federally created right identical to all other federally created rights. The defendant can raise his statutorily created right as a defense to the suit by recoupment after the §1635(f) 3 year limit expires as allowed by this Court, the Federal Circuit Courts and State Courts of last resort. This Court should affirm its long standing rule that refuses to reward Plaintiffs and make them responsible for the consequences of their wrongdoing by allowing defendants to defend by time barred claims, and put to an end the statutorily created right, statute of repose, statute of limitation dichotomy for federal claims.

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DAVID R. BEACH and LINDA M. BEACH, his wife,

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GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS

Respondents

CERTIFICATE OF SERVICE-REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I HEREBY CERTIFY that a true and accurate copy of the enclosed Reply Brief has been furnished on each of the parties and all persons required to be served with said documents by depositing an envelope, including a copy of all the documents, properly addressed in the U.S. Mail first class postage prepaid to: STEVEN ELLISON, ESQ., Broad and Cassel, P.A., 5th Floor Reflections Building, 400 Australian Ave. So. West Palm Beach, Fla. 33401, attorneys for Respondent, on this 3rd day of September, 1997

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